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Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

BRIEF FOR THE PETITIONER ON THE MERITS

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER.

BRIEF FOR THE PETITIONER ON THE MERITS

The first brief in support of the petition was prepared in some haste due to the limitation of time prescribed by the Supreme Court of Ohio in its stay order of December 20, 1940 (R. 37). It is felt that counsel may be somewhat more helpful to the court by a re-writing of that brief with reference to other authorities, some of which are decisions rendered since that brief was prepared, and which it is submitted support the contentions of the petitioner.

This brief seeks to reverse the judgment of the Supreme Court of Ohio denying the petitioner's application for an injunction to restrain the respondent from prosecuting a suit under the Federal Employers' Liability Act, in a Fed-

eral District Court in the Eastern District of New York. The court sustained the contention of the respondent and based its denial solely because Section 6 of that Act prevented it from granting an injunction that otherwise would have been granted.

The opinion below is *The Baltimore & Ohio Railroad Company, Appellant*, v. *Kepner, Appellee*, 137 Ohio St. 409, 30 N. E. (2d) 982, decided December 18, 1940, on Rehearing (R. 23).

STATEMENT OF THE CASE

The facts alleged in the petition for injunction (R. 1-5) admitted by the demurrer, and assumed by the Ohio Supreme Court to support your petitioner's contention, and substantiated by affidavits (R. 15-22), are these:

Respondent was at the time of the accident and since has been a resident of Hamilton County, Ohio (R. 1, 18). He was employed by your petitioner and was injured on May 18, 1939, while so employed at East Middletown, Butler County, Ohio, immediately adjoining Hamilton County to the north (R. 1, 18). Petitioner operates lines of railroad in both counties and has numerous agents in each upon whom service can be made (R. 1, 18).

No suit has been filed by the respondent for his injuries in Hamilton or Butler Counties or in the United States District Court for the Southern District of Ohio, all of which courts are in constant session (R. 1, 2).

Respondent employed Morris S. Borden and Samuel T. Gaines, attorneys of Cleveland, Ohio, to represent him, each of whom are engaged in general practice of law in Cleveland, and respondent failed to avail himself of the courts immediately available and within a reasonable distance of the residence of any and all of the witnesses necessary for the trial, but by agreement and conspiracy among respondent and his counsel proceeded to file suit in the United

States District Court for the Eastern District of New York (R. 2).

Edward M. Ballard and George Metzger, attorneys on Respondent's brief, are not counsel of record in said suit filed in the Eastern District of New York (R. 7) and appeared for Respondent only after the petition for injunction was filed in the Common Pleas Court of Hamilton County, Ohio (R. 7).

To maintain its defense, petitioner will have to transport not less than twenty-five witnesses (R. 2, 3, 16), all of whom reside in Hamilton or Butler Counties, Ohio, a distance of over seven hundred miles (R. 2). These witnesses consist of the employees of petitioner, numerous physicians, surgeons, radiologists, hospital attendants and others who gave him medical attention and numerous other non-employee witnesses as to various essential elements (R. 2, 3).

The medical witnesses are highly important because the nature and extent of Respondent's injuries are seriously disputed. All of the others are important because liability is disputed (R. 3, 19).

Petitioner would be totally deprived of its legal right of process to force the attendance of witnesses in the United States District Court, Eastern District of New York (R. 3), and they could not be compelled to attend a trial in New York and such as would consent to do so would have to be transported and maintained during the trial at great expense, which would be exceedingly heavy as to the medical experts. This expense would exceed by $4,000 the cost of the trial of the same issues in a court located near the residence of respondent (R. 3). The employee witnesses are engaged in interstate train service.

It is impossible to anticipate all of the witnesses that might be necessary and get them to the trial if needed (R. 4, 16, 17, 19). The presentation of testimony by depo-

sitions cannot effectively present to the court and jury the facts involved, petitioner being deprived of the right of presenting the witnesses in person, and rebuttal evidence would be impossible of procurement and submission (R. 4, 16, 17, 19).

Trials in the United States District Court, Eastern District of New York, are assigned in numerical order and it is impossible to tell the exact day the case will start (R. 3, 16). Therefore, it would be necessary to have the witnesses in New York a number of days prior to the probable date of trial because of the long distance involved (R. 3, 16). When the case is called for trial both parties must be ready to proceed forthwith.

Respondent conspired with his attorneys of Cleveland, Ohio, to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that respondent had against the petitioner (R. 3), and the continued prosecution of the action in New York would constitute an undue burden on interstate commerce and would be an unreasonable, improper and inequitable burden upon the petitioner, and such unreasonable and inequitable proceeding would result in no benefit to the respondent (R. 4).

All of the foregoing facts were admitted by the demurrer of respondent to be true.

The Court of Common Pleas of Hamilton County, Ohio, sustained a demurrer to the petition on the ground that the injunction prayed for would be in contravention of a right granted by the Federal Employers' Liability Act, as amended, Title 45 U. S. C., Sec. 56 (36 Stat. 291) (R. 11, 12). A copy of the Opinion of the court is Appendix A to the Petition for Certiorari herein, page 11.

On appeal to the Court of Appeals of the First Appellate District of Ohio, that court did, from the bench, dismiss the

petition and deny an injunction (R. 13), and that determination being in conflict with a judgment by the Court of Appeals of the Second Appellate District pursuant to Article IV, Section 6 of the Constitution of the State of Ohio did thereupon certify said cause to the Supreme Court of Ohio. There were two arguments in that court. On the first argument the court evenly divided. [*The Baltimore and Ohio R. R. Co., Appellant* v. *Frederick S. Kepner, Appellee*, 137 O. S. 206, 28 N. E. (2d) 586] (R. 35). Thereafter, the court on October 2, 1940, granted a rehearing (R. 37) and after reargument said court again affirmed the judgment below in an opinion rendered December 18, 1940. [137 O. S. 409, 30 N. E. (2d) 982.] On December 20th that court granted the petitioner a stay and injunction order (R. 37).

The Supreme Court of Ohio assumed that the equities alleged and admitted by demurrer were sufficiently great to warrant the granting of an injunction except that the Federal Employers' Liability Act barred the Ohio State courts from issuing an injunction against its citizens from proceeding in any Federal District Court, in which district the defendant shall be doing business.

It was the contention of your petitioner that Congress did not expressly prohibit a court of a state from exercising its equitable jurisdiction over its citizens, that Congress merely gave the employee the right to sue concurrently in a state or federal court where the employer was doing business, that Congress could be presumed to have known that a court of equity had jurisdiction to prevent citizens of its jurisdiction from unjustly harassing and oppressing others by bringing suits at a point farthest away from the residence of the employee and the situs of the accident and that as Congress did not expressly prohibit such equitable action a State court could restrain citizens of that state from such harassment in accordance with the well-founded principles of equitable jurisprudence.

The Supreme Court of Ohio by its said opinion rejected these contentions holding that Section 6 of the Federal Employers' Liability Act gave the injured employee the privilege of bringing his action in the District Court in any district, however remote, in which the defendant was doing business, when sued, and that the courts were without power to prevent his arbitrary and unreasonable choice of the farthest district from the scene of the accident and residence of the plaintiff, no matter how inequitable such choice might be.

SPECIFICATION OF ERRORS

Your petitioner submits that the Supreme Court of the State of Ohio was in error in the following respects:

1. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals and of the Court of Common Pleas, and in not reversing the Court of Appeals and the Court of Common Pleas.

2. The Supreme Court of Ohio erred in failing to enjoin permanently the Respondent from prosecuting his suit pending in the United States District Court for the Eastern District of New York.

3. The Supreme Court of Ohio erred in its interpretation of the Federal Employers' Liability Act.

4. The Supreme Court of Ohio erred in construing the Federal Employers' Liability Act as preventing the courts of Ohio from enjoining a citizen of that state within the court's jurisdiction from prosecuting an action under that Act in a Federal court so distant, and under such circumstances, as under the law of Ohio constituted vexatious, harassing, inequitable conduct subject to injunction.

5. The Supreme Court of Ohio erred in holding that the question involved was one of denying or interfering with the jurisdiction of the Federal courts.

6. The Supreme Court of Ohio erred in not applying the law of Ohio in determining what conduct of its own citizen

was inequitable and subject to the injunctive power of the courts of that State.

SUMMARY OF ARGUMENT

I.

Courts of equity have inherent power to restrain the prosecution of vexatious and harassing litigation, and it is the law of Ohio that its citizens are subject to the exercise of such power by its courts.

Pomeroy's Equity Jurisprudence (3rd Ed., Vol. 4, Sec. 1360) (Vol. 6, Sec. 670);
Snook v. *Snetzer*, 25 Ohio St. 516;
N. Y. C. & St. L. R. R. Co. v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349;
Cole v. *Cunningham*, 133 U. S. 107;
Dehon v. *Foster*, 4 Allen 545 (Mass.);
Steelman v. *All Continent Corp.*, 301 U. S. 278, 291;
Boston & M. R. R. v. *Whitehead*, 29 N. E. 2nd 916 (and cases cited).

II.

The Federal Employers' Liability Act neither expressly nor by implication forbids this exercise of power by the courts, nor does it so completely cover the field as to preclude the application of state law.

Douglas v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377;
See list of cases, brief pages 13, 14.
Maurer et al. v. *Hamilton et al.*, 309 U. S. 598.
Reid v. *Colorado*, 187 U. S. 137, 148.
Federal Trade Commission v. *Bunte Bros.*, U. S. , 61 S. C. R. 580, 582.
United States v. *F. W. Darby Lumber Co.*, U. S. , 61 S. C. R. 451, 459.
Hines v. *Davidowitz*, U. S. , 61 S. C. R. 399, 410;
Kelly v. *Washington*, 302 U. S. 1;
Michigan Cent. R. R. Co. v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

III.

The history of the amendment to Section 6 of the Federal Employers' Liability Act demonstrates that Congress did not intend to bar the equitable power of courts to restrain the prosecution of vexatious and harassing litigation, and that the exercise of such power would be in harmony with the purpose of the act.

Palmer v. *Webster & Atlas Bank of Boston*, U. S. , 61 S. C. R. 542, 545.
Thornton's Federal Employers' Liability Act, Third Edition, Appendix B at page 576, 580.
Congressional Record 45, Part 4, page 4040.

IV.

The restraint of a party to a suit is not tantamount to the restraint of the court itself.

Steelman v. *All Continent Corp.*, 301 U. S. 278, 290;
Brant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569.

V.

The facts in the present case are sufficient to invoke the equitable powers of a court.

B. & O. Rd. Co. v. *Kepner*, 137 Ohio St. 409 (R. 23).
Davis, Director General v. *Farmers' Cooperative Co.*, 262 U. S. 312.
Michigan Central R. R. Co. v. *Mix*, 278 U. S. 492.
Denver & R. G. W. R. Co. v. *Terte*, 284 U. S. 284.
N. Y. C. & St. L. Rd. Co. v. *Matzinger*, 136 Ohio St. 271.
Erie R. Co. v. *Tompkins*, 304 U. S. 64.

VI

The weight of authority supports the right to injunction and the Supreme Court of Ohio erred in holding otherwise.

Reed's Admrx. v. *Illinois Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794.

See numerous other state cases at page 27 of brief.
Ex Parte Crandall, 53 F. (2d) 969 (C. C. A. 7), c. d. 285 U. S. 540.
Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569.

VII.

The authorities relied upon by the Supreme Court of Ohio and the Respondent do not support the judgment of the court below.

[redacted]

VIII.

Whether the conduct of an Ohio citizen is equitable is a question of law, which an Ohio court having jurisdiction of the citizen is to determine in accordance with that law unless Congress within its delegated powers has made an enactment inconsistent with the Ohio law.

Millikin v. *Meyer*, U. S. , 61 S. C. R. 339.

STATEMENT OF THE QUESTIONS INVOLVED

The rule of the Supreme Court of Ohio is that the syllabus which is by the court states the law of the case, 136 O. S. Rules of Practice, Page LXXII, Rule VI. It is to be read in the light of the facts as stated in the opinion. Rule VI. See also *The B. & O. Rd. Co.* v. *Baillie*, 112 Ohio St. 567, Syl. 2. The syllabus of the opinion below reads:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

Your petitioner contended below that there is nothing in the Federal Act to prevent a State court from enjoining a citizen of that State from prosecuting an action under the Federal Act, whether in a State or Federal Court, where that prosecution would, under the circumstances, be inequitable, harassing, vexatious and contrary to the best interests of justice. And that the venue provisions of Section 6 of the statutes did not permit the employee to exercise his right of choice between the various jurisdictions available to him in an inequitable manner.

The respondent contended that under the Federal Act he could not be restrained from such prosecution in any Federal District Court in whose district the railroad did business, even though such prosecution would be in violation of the equitable principle just referred to.

It is submitted that the Ohio Courts erred in sustaining respondent's contention.

ARGUMENT

I. Courts of Equity Have Inherent Power to Restrain the Prosecution of Vexatious and Harassing Litigation, and It Is the Law of Ohio That Its Citizens Are Subject to the Exercise of Such Power by Its Courts

This power, we submit, is inherent in all Courts, State as well as Federal. The author in *Pomeroy's Equity Jurisprudence* (3rd Ed. Vol. 4, Sec. 1360) says:

> "The use of injunctions to stay actions at law was coeval with the establishment of chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction."

In *Snook* v. *Snetzer*, 25 Ohio St. 516, the court enjoined a citizen from prosecuting an attachment in West Virginia

against another Ohio citizen whose earnings were exempt in Ohio but not in West Virginia.

In *N. Y. C. & St. L. R. R. Co.* v. *Matzinger*, 136 Ohio St. 271, 25 N. E. (2d) 349, the syllabus, by the court, reads:

> "A Court of equity may restrain a person over whom it has jurisdiction from bringing or maintaining in a foreign State an action for the purpose or with the effect or unduly harassing or oppressing the defendant, or securing to the plaintiff some unfair, unconscionable or inequitable advantage."

Snook v. *Snetzer, supra*, was cited with approval by this court in *Cole* v. *Cunningham*, 133 U. S. 107, an authority recognized throughout the decisions bearing upon the equitable principle involved. In *Cole* v. *Cunningham*, this court followed *Dehon* v. *Foster*, 4 Allen 545 (Mass.), and at the middle of page 124 said:

> "*Dehon* v. *Foster*, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, C. J., points out that the jurisdiction of a Court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon a proper case made, either in the Courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in Courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the Court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country."

Cole v. *Cunningham* was last cited by this court in 1936, in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 291.

In a recent case decided by the Supreme Court of Massachusetts, *Boston & M. R. R.* v. *Whitehead*, 29 N. E. (2d) 916, at 917:

"There is no doubt that where a sufficient equity is shown courts of this Commonwealth have the same power to enjoin persons subject to their control from prosecuting suits in other States that they have to enjoin them from prosecuting suits in this Commonwealth. *Dehon* v. *Foster*, 4 Allen, 544, 550; *Cunningham* v. *Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am.Rep. 657; *Carson* v. *Dunham*, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. Rep. 397; *Columbian National Life Ins. Co.* v. *Cross*, 298 Mass. 47, 52, 9 N. E. (2d) 402; *Lydia E. Pinkham Medicine Co.* v. *Gove*, 298 Mass. 53, 66, 9 N. E. (2d) 573; *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538."

In that case the facts show that the suit was brought under the Federal Employers' Liability Act but that the place of bringing the suit, though in a foreign state, was only ninety-one miles from the scene of the accident and the court held that there was not a sufficient equity showing to warrant the granting of an injunction.

II. The Federal Employers' Liability Act Neither Expressly nor by Implication Forbids This Exercise of Power by the Courts, nor Does It so Completely Cover the Field as to Preclude the Application of State Law

There is nothing in the Act expressly prohibiting the exercise by the State Courts of their equity powers in a matter of this kind. There have been numerous cases decided by this court and the courts of last resort of various states where the contention has been made that the Federal Employers' Liability Act was complete and all-inclusive and that the state courts had no right to interpose interpretations which would conform to the practice in such state. The following list of cases shows that the Act has not been held to be all-inclusive and complete in itself and that there are many ways that the state can act and follow its law under the Federal Act.

In *Douglas* v. *N. Y., H. & N. H. R. Co.*, 279 U. S. 377, the question was as to the right of a Connecticut citizen, where the accident happened in Connecticut, suing under the Federal Act in a New York state court, a Connecticut corporation, doing business in New York. This court invoked a New York statute that authorized the state courts to dismiss the action. The last paragraph of the opinion, page 387, reads:

> "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57."

A State Court may order a conditional remittitur of damages. *Roy* v. *Oregon S. L. R. Co.*, 55 Idaho 404, 42 Pac. (2d) 476, c. d. 296 U. S. 579.

States retain full control over administrators and executors appointed by its Courts. *Spoo* v. *C. R. I. & P. Ry. Co.*, 191 Iowa 1134, 183 N. W. 850.

State procedure is sustained even though perjury of witnesses is proved. *Taylor* v. *C. C. C. & St. L. Rd. Co.*, Mo. , 63 S. W. (2d) 69, c. d., 290 U. S. 695.

The states may say whether the jury shall be unanimous or whether nine or less may return a verdict. *M. & St. L. R. R. Co.* v. *Bombolis*, 241 U. S. 211.

The states may decide who are the next of kin. *S. A. L. Ry.* v. *Kenney*, 240 U. S. 489.

The states may decide who is a beneficiary. *M. & S. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66.

The states may determine the rate of interest on judgments. *N. Y., N. H. & H. R. R. Co.* v. *Murmann*, 253 N. Y. S. 450, c. d. 288 U. S. 601.

The states may decide what constitutes service of summons. *Klinge* v. *So. Pac. Co.*, 65 F. (2d) 85, c. d. 290 U. S. 657.

The states may decide these cases under the state rules of pleading. *Williams* v. *St. L. & S. F. RR. Co.*, 85 S. W. (2d) 624, Mo.

An award under a state compensation law is a bar to a judgment in a suit under the Act. *C. R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611.

The state may prohibit a suit under the Act jointly against a railroad and a fellow employee. *Lee* v. *Cent. of Ga. Ry. Co.*, 252 U. S. 109.

A state venue statute was sustained in an action under the Federal Act. *Loftus* v. *Penn. R. Co.*, 107 Ohio St. 352; *Doll* v. *C. Y. W. Ry. Co.*, 159 Minn. 323, 198 N. W. 1006.

A state statute for a lien for an attorney's fee held good in an action under the Act. *Dickinson* v. *Stiles*, 246 U. S. 631.

A state statute providing a penalty for a frivolous appeal was sustained. *L. & N. R. Co.* v. *Stewart*, 241 U. S. 261.

Employees always had a right to sue a railroad for negligence. When Congress passed the Statute it knew that the courts had inherent power to enjoin citizens from maintaining harassing litigation. In *Maurer et al.* v. *Hamilton et al.*, 309 U. S. 598, this court, top of page 614, said:

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

The same principle was expressed by Mr. Justice Harlan in *Reid* v. *Colorado*, 187 U. S. 137, 148:

". . . It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot* v. *Davenport*, 22 How. 227, 243."

The controversy in this case relates solely to the effect of the Amendment made April 5, 1910, to Section 6 of the Federal Employers' Liability Act, in these words:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291, 45 U. S. C. Section 56.)

The question is, did Congress by this language take away from the state courts having jurisdiction over a claimant under the act resident in the jurisdiction of that court, the power to enjoin him from prosecuting his claim in a distant federal court, when such action is so brought for the purpose of inequitably harassing and vexing the defendant, which power of injunction is a recognized power in the state court under law of the state of claimant's residence.

This court has within the last few months had several occasions to determine the question of whether federal

power granted under acts of Congress excluded powers of a state. As said by Mr. Justice Frankfurter in *Federal Trade Commission* v. *Bunte Bros.*, U. S. , 61 S. C. R. 580, 582:

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. . . . the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in Sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

And as said by Mr. Justice Stone in *United States* v. *F. W. Darby Lumber Co.*, U. S. , 61 S. C. R. 451, 459:

> "In the absence of congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce."

Mr. Justice Stone also said in his dissenting opinion in *Hines* v. *Davidowitz*, U. S. , 61 S. C. R. 399, 410:

> "Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

Mr. Justice Black in the same case, in rendering the opinion for the court said, at page 404:

> "Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In *Kelly* v. *Washington*, 302 U. S. 1, Mr. Chief Justice Hughes at page 10 said:

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

We contend that there is nothing in the Act to show that Congress intended to nullify the equity powers of the state courts in cases arising under the Act.

Congress, as much as the courts, must have realized that the broad venue provisions of the act might result in inequitable use of such provisions and have left the courts unfettered to prevent by injunction such inequitable action.

The injunction would not have deprived the respondent of any right specifically granted by the Act. It reads, "An action may be brought in a District Court of the United States in the district . . . in which the defendant shall be doing business at the time of commencing such action." Notwithstanding the injunction he still could sue in the district in which the defendant shall be doing business convenient for him and all parties. The statute does not say he can sue in any district in which the defendant shall be doing business, although the Supreme Court of Ohio and

other courts have erroneously assumed that Congress intended "the district" to mean "any district."

This court prohibits actions under the Act in state courts if the business in that jurisdiction of the defendant is only the maintenance of an office for solicitation where the prosecution thereof would burden interstate commerce and no reason is apparent for a distinction were the selected tribunal a federal district court. *Michigan Cent. R. R. Co.* v. *Mix*, 278 U. S. 492, 73 L. Ed. 470.

III. The History of the Amendment to Section 6 of the Federal Employers' Liability Act Demonstrates That Congress Did Not Intend to Bar the Equitable Power of Courts to Restrain the Prosecution of Vexatious and Harassing Litigation, and That the Exercise of Such Power Would Be in Harmony with the Purpose of the Act

The history of the Act demonstrates that Congress did not intend to bar the equitable remedy now contended for, and that such remedy would be in harmony with the purpose of the Act. The history and purposes of the Act (28 U. S. C., Section 56) are clearly shown in the Committee reports in support of the bill. To such reports this court frequently resorts to determine the purposes of legislation:

Palmer v. *Webster & Atlas Bank of Boston*, U. S. , 61 S. C. R. 542, 545;
United States v. *Gilliland*, U. S. , 61 S. C. R. 518, 522;
Helvering v. *Hutchings*, U. S. , U. S. Law Week March 4, 1941, page 4233;
United States v. *Pelzer*, U. S. , U. S. Law Week March 4, 1941, page 4235.

The Federal Employers' Liability Act as adopted in 1908 was subject to the limitations of Section 51 of the Judicial Code requiring an action in a federal court founded on a federal statute, to be brought in the district of which the claimant was an inhabitant, and in Connecticut it was held

that the Act could only be enforced in the federal courts, and did not apply to actions brought in a state court. The reasons for the amendment are fully stated in the Senate Report, March 22, 1910, to accompany H. R. 17263, submitted by Mr. Borah from Committee on Judiciary. It is printed as Appendix B in Thornton's Federal Employers' Liability Act, Third Edition, at page 576. At page 580 is quoted that part of President Taft's message of January 7, 1910, relating to the necessity of amendment. With respect to the place where suit could be brought he said:

> "The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than that of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law."

Following the quotation from the President's message, the report of the committee continues, as follows:

> "AMENDMENT AS TO JURISDICTION—PLACE WHERE SUIT MAY BE BROUGHT.
>
> This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.'
>
> This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was

> issued. This may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned.
>
> The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances.
>
> * * * * *
>
> No argument is necessary to convince that this is a grave injustice to the plaintiff.
>
> Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a Federal court on a right based on the law of the United States.
>
> But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting this case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist."

The report is found in Congressional Record No. 45, Part 4, Page 4040. The quotation from President Taft's special message is found in the second column of page 4041.

It is seen that the whole purpose of the amendment was to enable the plaintiff-employee to bring his suit at a place convenient for him. In the language of President Taft, his right "should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws." Manifestly, there was no intention to secure to the claimant a right to do that which constituted the injury against which he was being protected uncircumscribed by the equitable jurisdiction to restrain an inequitable exercise of a

legal right. The intention was to give him the same, and no greater, right than the ordinary litigant who is not allowed to exercise his rights in an inequitable manner. He could bring his action in a state or federal court where, because of the doing business by the defendant railroad, service could be had. But there was no declaration by Congress that he had a right to bring his action in every such court. The power to restrain the inequitable election of courts was not interfered with, either explicitly or by implication.

Certainly it cannot be said that the application to this case of the principle of law established in Ohio, of enjoining an inequitable and harassing prosecution of a suit for damages in a distant court, would, in the language of Mr. Justice Black "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, *supra*.

IV. The Restraint of a Party to a Suit Is Not Tantamount to the Restraint of the Court Itself

It is not and never has been contended by the Petitioner that an injunction by the Supreme Court of Ohio would in any way interfere with or impair the jurisdiction of the District Court of the United States for the Eastern District of New York. The action was only to enjoin the respondent, who is a citizen of Ohio and subject to the jurisdiction of the Common Pleas Court of Hamilton County, Ohio, on the ground that he was using a legal process in an inequitable, unconscionable and vexatious manner by proceeding with his action brought in that distant court. The language of Mr. Justice Cardozo in *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 290, is appropriate. He said, omitting citations:

> "The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdic-

> tion be taken in its strict and proper sense. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. Suits as well as transfers may be the protective coverings of fraud. We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

Judge Learned Hand, for the Circuit Court of Appeals, Second Circuit, in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, at page 571, near the end of the second column said:

> "For the Virginia suit was based upon the notion that plaintiff was using inequitably a legal right—the right of action under the Federal Employers' Liability Act—just as he might use the legal title to land inequitably."

We submit that Congress did not grant the employee a Federal right to do an inequitable thing and one which equity would enjoin but for the Act. The granting of an injunction by Ohio courts would not deny the respondent a Federal right because Congress has not given a right to bring an inequitable action. To express it differently, Congress has not attempted either expressly or by implication to deprive the State courts of their jurisdiction in equity. The State of Ohio is a sovereignty having inherent rights to control its citizens from maintaining unjustly harassing and vexatious litigation. That inherent right was not ex-

pressly denied in the Federal Act and unless expressly denied the statute must be strictly construed against a denial of such right by implication.

V. The Facts in the Present Case Are Sufficient to Invoke the Equitable Powers of a Court

This court is familiar with the serious burden on interstate commerce from the prosecution of tort cases in remote jurisdictions. *Davis, Director General* v. *Farmers' Cooperative Co.*, 262 U. S. 312; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. It is held that such burden to interstate commerce bars the prosecution of such suits. In *Denver & R. G. W. R. Co.* v. *Terte*, 284 U. S. 284, the Court held that such burden on interstate commerce is not a bar to the prosecution of an action under the Federal Employers' Liability Act in a jurisdiction where the defendant railroad owns and operates railroad lines. There is presented in this case something more than mere burden on interstate commerce. It is alleged that the Ohio plaintiff, Kepner, and his Ohio counsel conspired to bring his action in the Eastern District of New York for the purpose of annoying, harassing and vexing petitioner herein, the railroad company, without a sound and proper purpose of reasonably prosecuting any right of action that Kepner may have against the railroad company. Brooklyn, New York, where the action is pending, is eight hundred miles from the scene of the accident and seven hundred seventy-five miles from the residence of Kepner. The railroad company has twenty-five witnesses, all in Hamilton and Butler Counties, Ohio, none of whom are subject to subpoena in the pending action. It has never been claimed that Kepner has any witnesses other than those in Ohio. It is impossible to ascertain in this District Court a definite time of trial and it would be necessary to be ready for trial and the railroad company have its numerous witnesses in New York several

days before the probable date of trial and to be maintained there for all of the said period, in addition to the time necessary for the trial itself, and the actual cost would exceed that in a jurisdiction adjacent to the accident or residence of Kepner by at least $4,000.

The inequity in this prosecution exceeds the inequity in the case of *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 Ohio St. 271, and that in *Denver & R. G. W. R. Co.* v. *Terte*, *supra*. This court will take judicial notice, as did the Ohio Supreme Court in the *Matzinger* case, of the fact that the presentation of evidence by deposition is unsatisfactory and also of the fact that it is obvious that rebuttal evidence would be impossible of procurement and submission. Where there is a large number of physicians and surgeons, as is the case herein, a more than usual amount of expense and annoyance is involved especially where such witnesses have to travel a long distance and be maintained a long and extended period of time awaiting opportunity to testify. It might, indeed, be impossible to get them to leave their patients to so testify.

The Ohio courts below were asked to regulate the conduct of an Ohio citizen in accordance with the law of the State as declared by its Supreme Court governing his action with respect to the prosecution of actions of this character. What constitutes proper conduct of a citizen of Ohio is determinable by the laws of Ohio. The Supreme Court of Ohio below (R. 25) said:

> "We may, therefore, assume that the equities shown by the petition favor the contention of the plaintiff and it remains only to be determined whether the petition is otherwise sufficient to state a cause of action."

This court has pointed out in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, that the law of a State is that contained in the decisions of its courts as well as in its statutes and that the

laws of the State are as binding on the Federal courts as on the State courts.

When one considers the tremendous amount of litigation that goes on under the Federal Employers' Liability Act and the possibility of the tremendous increase in the cost both of time and money in such litigation if it be the law that the plaintiffs therein may resort to the District Court of the United States having jurisdiction farthest removed from the plaintiff's residence and the scene of the accident, it must be concluded that there be in the courts an adequate remedy to prevent such abuse of the mere right of venue.

If, as the court said in the *Davis* v. *Farmers Cooperative Co.* case, *supra*, suits against carriers, especially at far distant points, is an undue burden on interstate carriers, then it is all the more a burden and an harassment to have railroad employees at the present time carried far distances, as here, and kept from their work for a long and indefinite period attending the trial, when they should be at work assisting transportation due to the emergency confronting the country today, as is evidenced by the numerous recent enactments of Congress, of which, we submit, the court must take judicial notice.

Even since the filing of the petition and the supporting brief herein the pressure on the transportation facilities of the railroads has measurably increased. The necessity of conserving man power for duties essential to the defense program makes it increasingly important that the time and energies of the employees of the railroads of this country be not needlessly expended in attending the trial of cases many hundreds of miles distant from the place of their duties. A decision by this court of this petition favorable to the petitioner would be in the interest of the national economy, and, we submit, in harmony with the Act of Congress, as well as in harmony with the views of this court at the time of a prior emergency in *Davis* v. *Farmers Co-*

operative Co., 262 U. S. 312, 315, where Mr. Justice Brandeis said:

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

VI. The Weight of Authority Supports the Right to Injunction and the Supreme Court of Ohio Erred in Holding Otherwise

Injunctions against the prosecution of inequitable and harassing actions under the Federal Employers' Liability Act in distant State courts have been often sustained by the decisions of the highest courts of the State.

Reed's Admrx. v. Illinois Central R. R. Co., 182 Kentucky 455, 206 S. W. 794.

At page 464, Judge Carrol for that court said:

> "We do not, however, give to this statute the preemptory effect claimed for it by counsel for the administratrix or agree with their contention that, as it was allowable under the act to bring this suit in the State of Minnesota, therefore the plaintiff could not be restrained by injunctive process from prosecuting it to a conclusion in that state. . . .
>
> "The Federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

Louisville & Nashville R. Co. v. *Ragan*, 172 Tenn. 593, 113 S. W. 743.

Kern v. *C. C. C. & St. L. Ry. Co.*, 204 Indiana 595, 185 N. E. 446.

Missouri ex rel. N. Y. C. & St. L. R. R. Co. v. *Nortoni*, 331 Missouri 764, 55 S. W. (2d) 272.

See also:

Chicago, M. & St. P. R. R. Co. v. *McGinley*, 175 Wis. 565, 185 N. W. 218.

It was there said at the bottom of page 220:

> "There is nothing in the Federal Employers' Liability Act as amended, which is indicative of an intent on the part of Congress to prohibit a court of equity from so regulating the conduct of its own citizens by an injunction, as to prevent hardship, oppression, or fraud, and if prior to the passage of such Employers' Liability Act, the power existed in a court to grant relief by injunction as indicated, such power continued to exist and now exists."

New York, C. & St. L. R. R. Co. v. *Perdue*, 97 Ind. App. 517, 187 N. E. 349.

Alspaugh v. *N. Y. C. & St. L. R. Co.*, 98 Ind. App. 280, 188 N. E. 869.

This action of the State courts has been recognized as valid in the United States Circuit Court of Appeals in the Seventh and Second Circuits.

Ex Parte Crandall, 53 F. (2d) 969 (C. C. A. 7), c. d. 285 U. S. 540.

We quote from page 971, second column:

> "The general right of Indiana citizens to begin actions of this nature, wherever service of process on the defendant could be had, *was always potentially qualified by the jurisdiction of equity to restrain the citizen from commencing the action in a foreign jurisdiction, where to do so would unreasonably, inequitable, and unfairly harass, oppress, or defraud the defendant.*
>
> "*The Federal Employers' Liability Act does not assume to remove this qualification*, and in our judgment does not exempt the citizen from invocation against him of this equitable jurisdiction under facts which would in general justify its application." (Italics ours.)

Bryant v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, (C. C. A. 2). At page 571, first column, it is said:

> ". . . *The situation here is quite different; for even if the Virginia court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction.* . . . In the case at bar the questions adjudicated in Virginia were not those decided by motion in the Federal action. The Virginia decree was not granted because the action would burden interstate commerce, *but because it would unfairly vex and oppress the defendant, quite another ground.* . . ." (Italics ours.)

Injunctions against the prosecution of such cases in distant Federal District Courts have been granted.

B. & O. R. R. Co. v. *Bole*, 31 Fed. Supp. 221.

Atlantic Coast Line R. R. Co. v. *Bryant* in Virginia, referred to in *Bryant* v. *A. C. L. R. R. Co.*, 92 F. (2d) 569, *supra*.

B. & O. R. R. Co. v. *Inlow* (Unreported), referred to by the court below. Decision attached to petition for certiorari, Appendix B (p. 14).

Southern Ry. Co. v. *Ethel Painter, Admrx.*, 117 F. (2d) 100, Chancery Court, Knox County, Tennessee. The decision basis for petition for certiorari, No. 746, filed February 4, 1941.

VII. The Authorities Relied Upon by the Supreme Court of Ohio and the Respondent Do Not Support the Judgment of the Court Below

The Supreme Court of Indiana has held that the terms of Section 6 of the Federal Employers' Liability Act prevent a state court from enjoining a plaintiff in an action under that act from prosecuting a claim in any United States District Court in which the defendant does business. *McConnell* v. *Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

This decision was made notwithstanding the recognition in Indiana of the right to an injunction when the action under the Federal Employers' Liability Act is brought in a distant state court.

Kern v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 204 Ind. 595, 185 N. E. 446.

The Supreme Court of Ohio below at page 419 (R. 31) cites eight cases as supporting "by the overwhelming weight of authority" the doctrine of *McConnell* v. *Thomson, supra.*

Of the cases cited, all but one related solely to the question of jurisdiction of the court in which was brought the action against the railroad under the Federal Employers' Liability Act. Of course, a court given jurisdiction by the Federal statute cannot refrain from exercising that jurisdiction when invoked pursuant to the statute. The four following cases were decisions on motions to dismiss for want of jurisdiction, or to set aside service, involving only

the question whether or not the defendant railroad was doing business at the point served, or whether that jurisdiction could be denied by the court because of interference with interstate commerce. In none of them is there a consideration of the equitable principles asserted herein.

Connelly v. *Central R. R. Co. of New Jersey*, 238 Fed. 932;
Norris v. *Illinois Central R. R. Co.*, 18 F. (2d) 584;
Wood v. *Delaware & H. R. Corp.*, 63 F. (2d) 235 (C. C. A. 2);
Trapp v. *Baltimore & Ohio R. R. Co.*, 283 Fed. 655.

Southern Railway Co. v. *Cochran*, 56 F. (2d) 1019, was a decision of the Sixth Circuit Court of Appeals refusing a writ of prohibition against a District Judge to prevent his entertaining jurisdiction of an action under the Federal Employers' Liability Act. It did not seek an injunction against the plaintiff in a Federal Employers' Liability action, and involved solely a consideration of the jurisdiction of the District Court.

C. M. & St. P. R. Co. v. *Schendel*, 292 Fed. 326, s. c. 300 Fed. 273, was decided by the Eighth Circuit Court of Appeals on the basis that the Federal Court having acquired jurisdiction of an action under the Federal Employers' Liability Act had power to protect that jurisdiction to the extent of enjoining the railroad and others from interfering in the Iowa state courts with a proceeding in the Federal Court in Minnesota. The equitable phases were not involved. The court near the bottom of page 334 expressly says:

> ". . . We do not feel called upon to discuss the cases cited where the courts have held that equity may enjoin citizens of one state from bringing action in other jurisdictions. They do not apply to this situation. We are satisfied that the order was not

> issued on equitable grounds of oppression or hardship, but on the ground that the public policy of the state was being violated."

Hoffman, Judge v. *Missouri, ex rel. Foraker*, 274 U. S. 21, considered the jurisdiction of a state court of a Federal Employers' Liability action in a Missouri county traversed by the railroad, when the accident occurred in Kansas and the deceased was a citizen of that state. The defendant was a Missouri corporation, and the question raised and decided in that case was that the incidental burdening of interstate commerce did not interfere with the jurisdiction of the state court.

C. & O. Ry. Co. v. *Vigor*, 90 F. (2d) 7 (C. C. A. 6), was a case in which the Federal District Court for the Southern District of Ohio was asked to enjoin the prosecution of an action in the Federal District Court for the Northern District of Indiana on the ground of inequitable conduct on the part of the plaintiff in the Indiana suit, and unconscionable hardship imposed on the defendant in that suit by its prosecution at a distance from the scene of the accident, the residence of the plaintiff, and the residence of her decedent, all of which were in Ohio. A reason assigned by the court for its decision was that the facts alleged in the bill and set forth in the supporting affidavits did not justify the court in reversing the court below. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The cases cited, therefore, do not sustain the point to which they are cited by the Supreme Court of Ohio, nor

the principle of the decision of the Supreme Court of Indiana in *McConnell* v. *Thomson, supra.*

The court also cited 28 *American Jurisprudence* 400, Sec. 217, an authority which relies in part upon *McConnell* v. *Thomson, supra*, which, it is submitted, was wrongly decided. In Note 19 various cases of this court are cited to the general rule that state courts have no authority to enjoin the proceedings in the Federal courts. None of these cases are at all like the case at bar. Four cases in 6 *Wallace* are cited, involving the same principle, the important opinion being *Riggs* v. *Johnson Co.*, 6 *Wallace* 166, 18 L. Ed. 768, in which the Supreme Court held that it was no defense to a mandamus proceeding in the Circuit Court of the United States against the County Commissioners requiring them to levy a tax to pay the judgment on county bonds awarded by that court, that the Commissioners had been enjoined in a state court from levying such tax, the suit for such injunction having been brought subsequent to the Circuit Court's judgment on the bonds. *Central National Bank* v. *Stevens*, 169 U. S. 432, 42 L. Ed. 807, is a case decided on the same general principle, in which a state court attempted to enjoin parties to a decree in the Circuit Court of the United States, determining their rights in their favor, from availing themselves of that decree, and compelling them to re-litigate their rights in the state court. *Moran* v. *Sturgis*, 154 U. S. 256, 38 L. Ed. 981, 14 S. Ct. 1019, was a case reversing an injunction granted in a state court against parties claiming to hold marine liens, from prosecuting their proceeding in Admiralty under which the U. S. Marshal had seized vessels belonging to a corporation which the state court was winding up, which seizure by the Marshal was made on the same day that state receiver was appointed or before the state receiver had taken possession.

Two other cases cited—*Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 S. Ct. 119, and *Prout* v. *Starr*, 188 U. S. 537, 47 L. Ed. 584, 23 S. Ct. 398, were not cases involving injunctions by state courts, but, in the first was held invalid an injunction by the United States Circuit Court against the Commonwealth Attorney from prosecuting a criminal proceeding involving a decision of different questions from that to be determined in the United States Circuit Court, while in the second case, an injunction of the United States Circuit Court against Prout, Attorney General of Nebraska, was sustained, which order, among other things, enjoined him from proceeding with his action in a state court in which he sought a judgment contrary to a prior injunction in the United States Circuit Court against his predecessor and stipulations therein that that case would abide the judgment of *Smyth* v. *Ames*, 169 U. S. 466. No injunction was sought in the state court.

In the case at bar there is no attempt to have the state courts of Ohio draw to themselves or pass upon any of the issues of the case in the District Court of the United States for the Eastern District of New York, nor to compel the plaintiff therein to litigate his question in a state court. It would be entirely consonant with any injunction to be rendered, that the plaintiff employee bring his action in the District Court, the venue of which would be a reasonable one for the determination of the issues. The issues in the state court were entirely distinct from the issues to be determined in the Federal Court.

There is also cited in 28 *American Jurisprudence* 400, *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 266, 43 S. Ct. 79, 24 A. L. R. 1077, holding that a state court and a Federal court may each litigate the same questions at the same time, without interference, one with another,

where the actions are *in personam*. At page 235 of the opinion in 260 U. S. it was said:

> "The well established rule, to which we have referred, that where the action is one *in rem* that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the *res*, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 305. The rank and authority of the courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Such was the principle applied by the Circuit Court of Appeals for the Second Circuit in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, applying the principle to an action for damage under the Federal Employers' Liability Act pending in the United States District Court for the Eastern District of New York, and a suit for an injunction by the defendant therein against the plaintiff in the state court of Virginia, based on the inequity of the proceeding in New York.

It is therefore submitted, that there is no overwhelming weight of authority, as said by Judge Hart in his opinion at page 419 (R. 31), "that the jurisdiction of the federal courts to determine causes arising under the Federal Employers' Liability Act cannot be enjoined or interfered with by a state or by state or other courts."

Great reliance is placed by counsel for respondent in his brief herein, on *Missouri ex rel. St. Louis, B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, a case in which a resident of Missouri, consignee of freight shipped from Texas to St. Louis, sued a Texas carrier under the Carmack Amendment in a state court of Missouri, in which state the defendant had no railroad or office. The plaintiff obtained jurisdiction over property of the defendant in the hands of other carriers by garnishment. A part of the transportation in question for which the defendant was made liable by the act, occurred in Missouri, the residence of the plaintiff, and as pointed out by the court "for aught that appears the negligence complained of occurred within Missouri." It was not a case of a resident of Texas going to a distant state to sue a defendant doing business in Texas. In fact, it was not a case where any relief was sought against a Missouri resident on the ground of inequitable conduct. It was a case entirely different from that at bar, where an Ohio resident, employing Ohio counsel, who could have easily brought his action in a state or Federal court sitting at the place of his residence, or in the adjoining county where the accident occurred, instead taking his action to a court more than 700 miles away, the farthest point that he could go and find the defendant doing business, and confessing by demurrer that this was done for the purpose of annoying, harassing and vexing the railroad company without a sound and proper purpose, and without any benefit to him.

ERROR OF INDIANA AND OHIO COURTS IN HOLDING THAT FEDERAL EMPLOYERS' LIABILITY ACT PREVENTED INJUNCTION OF PROSECUTION IN FEDERAL COURT

The Indiana Supreme Court in *McConnell* v. *Thomson*, *supra*, and the Ohio Supreme Court, assumed that the plaintiff in an action under the Federal Employers' Li-

ability Act is given a right by that act to sue the defendant railroad company in any United States District Court, in the district of which the defendant does business, and that such a right conferred by Federal statute cannot be interfered with by the courts, whereas, the plaintiff's right to sue in any state court having jurisdiction of the subject matter of the litigation, and of the defendant railroad company, is not a right given by Federal statute, and if his action in a state court be inequitable its prosecution may be enjoined. The error in this position is that the plaintiff's right to sue in the court of another state than that of his residence, is a right conferred upon him by Section 2, Article IV of the United States Constitution, as construed by this court.

Blake v. *McClung*, 172 U. S. 239, 256;
Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142, 148;
Missouri Pacific R. Co. v. *Clarendon Co.*, 257 U. S. 533, 535.

A right conferred by the Constitution of the United States is certainly as important as a right conferred by statute. Equity can and should prevent an inequitable exercise of either right. The constitutional right to sue in a court of another state does not present a court at the domicile of that plaintiff from enjoining an inequitable invoking of that right.

Cole v. *Cunningham*, 133 U. S. 107, 109, 134; 14 R. C. L. 412, Sec. 113, *Injunctions*; 28 *American Jurisprudence*, 392, Sec. 206.

That a Federal statute confers the right to sue in a Federal court does not prevent another court from enjoining plaintiff in a suit brought pursuant to such statute from further prosecution thereof, when such prosecution is inequitable or fraudulent.

Steelman v. *All Continent Co.*, 301 U. S. 278, 290.

The Supreme Court of Ohio Erred in Its Interpretation of the Bryant Case

We call attention to the court's statement on page 421 of its published opinion (R. 32) where it said:

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the State Court of Virginia to enjoin the plaintiff from prosecuting his action in the Federal Court."

The Circuit Court of Appeals was not trying the injunction suit which the Railroad Company had brought in a state court of Virginia; on the contrary, it was deciding against an injunction by the employee sought in the federal court in Brooklyn to restrain the Railroad Company from acting in the Virginia state court. Near the bottom of the first column, page 571, the court, in the *Bryant* case, said:

> "The situation here is quite different, for even if the Virginia Court ought not to have enjoined the plaintiff, it had undoubted jurisdiction to do so; Congress had not forbidden its exercising that jurisdiction."

It seems to us, therefore, that the court's language in the *Bryant* case specifically was that the state court of Virginia had jurisdiction to enjoin the employee from prosecuting his suit in New York. It concluded that the action for damages in the Federal Court in New York could proceed, as could also the action of the Railroad for an injunction in the Virginia court. If, as the Supreme Court said, the court in the *Bryant* case did not approve the Virginia injunction, then what did the Circuit Court of Appeals mean by the quoted language? The federal court did not interfere with the prosecution of the Virginia injunction case, but said that it could progress, at the same time as the suit for damages in New York.

The Supreme Court of Ohio, we contend, appears to have fallen into an error, not unusual in these cases, of overlooking the fact that equity acts *in personam*, and that an action to enjoin is not an action against the foreign court, but against the state citizen who, it is claimed, is using a legal right in an equitable manner.

VIII. Whether the Conduct of an Ohio Citizen Is Equitable Is a Question of Law, Which an Ohio Court Having Jurisdiction of the Citizen Is to Determine in Accordance with That Law Unless Congress within Its Delegated Powers Has Made an Enactment Inconsistent with the Ohio Law

The Ohio law and the duty of an Ohio citizen not to prosecute vexatious and harassing litigation at great distances from the scene of the accident, the residence of the citizen, and the location of the witnesses, is established by the opinion of the Supreme Court of Ohio in *N. Y. C. & St. L. Rd. Co.* v. *Matzinger*, 136 O. S. 271, 25 N. E. (2d) 349. Kepner is a citizen of Ohio and subject to the laws thereof. As said by Mr. Justice Douglas in *Milliken* v. *Meyer*, U. S. , 61 S. C. R. 339:

> "The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. 'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279. . . . *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. . . ."

Since the decision of this court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court has, in repeated decisions, manifested a concern to sustain state law whether that law be the statutory law of the state, or the law determined by the courts of the state, save only where Congress within its

delegated powers has enacted legislation which clearly manifests an intent to supersede the state law. Such intent to supersede the state law is not ordinarily found from implication. The repugnance must be so direct and positive as that the two laws cannot be reconciled or consistently stand together. See authorities heretofore cited under heading II.

CLOSING SUMMARY

The right granted by section 6 of the Federal Employers' Liability Act to bring an action in the district "in which the defendant shall be doing business" must have been granted in the light of that power of equity to restrain in a proper case the abuse of the right due to the very great extent of territory in which the railroads do business. An injunction to prevent prosecution of such action vexatiously many hundred miles distant from the residence of plaintiff, the place of the accident and the location of the witnesses, still leaves in the plaintiff the right to bring his action in a convenient district in which the defendant does business. The statute does not expressly provide that he may bring his action in every such district. This court prohibits such actions in state courts if the business is only the maintenance of an office for solicitation, where the prosecution thereof would burden interstate commerce, and no reason is apparent for a distinction were the selected tribunal a Federal District Court. The Federal Employers' Liability Act nowhere expressly denies the right to the equitable relief sought by the petitioner and denied by the Ohio courts. Displacement of the local law is not to be inferred unless clearly indicated by considerations persuasive of the statutory purpose. The state law must yield only if the purpose of the Act of Congress cannot be otherwise accomplished. Certainly it will not be contended that the bringing of an action by respondent in the Eastern District of New York, which is the point farthest removed where suit could be brought, is essential to the accomplishment of the purposes of the act.

The right to bring an action in a distant district under Section 6 of the Federal Employers' Liability Act is no more sacred than that established by the Federal Constitution to sue in any State, the same as citizens of that State. If, when the distant action be under the circumstances inequitable, prosecution of the latter can be enjoined, so should the prosecution of the former. That a federal statute confers the right to sue in a federal court does not prevent another court from enjoining the plaintiff in a suit brought pursuant to that statute from further prosecution thereof when such prosecution is inequitable. No attack was made below on the jurisdiction of the District Court in the Eastern District of New York, nor on its process, nor is any made now, nor any attempt to interfere with any action of that court. It was only sought to compel a citizen of Ohio to conduct himself in accordance with the laws of Ohio, and refrain from prosecuting harassing and vexatious litigation, since he had abundant opportunity of litigating his cause of action without such harassment and vexation. That conduct was determinable by the laws of Ohio and the Supreme Court of Ohio erred in setting aside its own judgment in that respect due to a mistaken construction of the Federal Act, and of the decisions of the federal courts.

It is therefore respectfully submitted, that the Supreme Court of Ohio was in error in not applying to this case the Ohio law as heretofore determined by it; that it erred in its construction and effect of Section 6 of the Federal Employers' Liability Act, and that its judgment should be reversed.

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